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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

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9 United States of America

10 No. CR18-08246-PCT-DGC

11 Plaintiff,

12 **ORDER**

13 v.

14 Martin Gerardo Mendoza,

15 Defendant.

16 The government has charged Defendant Martin Gerardo Mendoza with three counts
17 of abusive sexual contact in violation of 18 U.S.C. §§ 1152, 2242(2)(B), 2244(b),
18 2246(2)(A), and 2246(3). Doc. 40. Pending before the Court are Mendoza's and the
19 government's motions in limine. Docs. 61, 62, 73. The Court will deny Mendoza's motion
20 and grant the government's motions in part.

21 **I. Background.**

22 The government alleges that Mendoza sexually abused his coworker, C.B., while at
23 a work conference. *See* Docs. 40; 61 at 2. On May 3, 2018, Mendoza and C.B. drove
24 together to the conference in Prescott, Arizona. Doc. 61 at 2. Later that evening, Mendoza
25 and C.B. visited several bars with their coworkers and C.B. became very intoxicated.
26 Unable to walk unaided, Mendoza and another coworker helped C.B. to her hotel room,
27 used her room key to enter, placed her on the bed, and then left. *Id.* According to the
28 government, Mendoza kept C.B.'s room key and, about 30 minutes later, returned to abuse

1 her. *Id.*

2 **II. Federal Rules of Evidence 401, 402, and 403.**

3 The relevance and admissibility of evidence at trial is governed in part by Rules 401,
4 402, and 403. Evidence is relevant under Rule 401 if it has any tendency to make a material
5 fact more or less probable. Fed. R. Evid. 401(a)-(b). Rule 402 provides that relevant
6 evidence is admissible unless otherwise excluded by the rules, a federal statute, or the
7 Constitution, and that irrelevant evidence is not admissible. Fed. R. Evid. 402. Rule 403
8 states that relevant evidence may be excluded if its probative value is substantially
9 outweighed by the danger of “unfair prejudice, confusing the issues, misleading the jury,
10 undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid.
11 403. Trial courts have discretion to limit or exclude evidence under Rules 402 and 403.
12 *United States v. Scholl*, 166 F.3d 964, 971 (9th Cir. 1999).

13 **III. The Government’s Motions.**

14 **A. To Preclude Testimony under Rules 401-404 and 608.**

15 Mendoza disclosed summaries of his investigator’s interviews with two coworkers,
16 Martin Lopez and Sonia Bermudez. *See* Doc. 61 at 3. Based on that disclosure, the
17 government moves to preclude certain testimony under Rules 401-404 and 608. *Id.* at 2-3.

18 Lopez stated to the investigator that C.B. is “more aggressive than most women,” a
19 “very jolly person,” and “one of the guys.” *Id.* at 3. He also stated that a supervisor once
20 “threw some work gloves on [C.B.’s] desk and asked her to do something with them,” and
21 C.B. felt offended. *Id.* Of this incident, Lopez stated that C.B. “made a bigger deal than it
22 actually was.” *Id.* He reported that he did not feel comfortable going to conferences with
23 her because he did not want her to “turn things into something they’re not,” and that he has
24 lost trust in her. *Id.* Lopez stated also that Mendoza is nice, honest, and “not a pig.” *Id.*

25 Bermudez described C.B. as loud, and “aggressive at work.” *Id.* She stated that
26 C.B. has made unspecified “racial remarks” about “black guys or Chinese guys,” and that
27 C.B. has no filter, acts like a teenager, and “lacks common sense for a woman her age.”
28 *Id.* Bermudez reported that C.B. once embarrassed herself at a party and needs to stop

1 drinking. *Id.*

2 Mendoza does not seek to admit much of the testimony above, and offers only the
3 following under Rule 608. *See Doc. 74.* Mendoza will elicit from Lopez that C.B. “is
4 dangerous and will turn things into something they are not,” and that she lacks a character
5 for truthfulness. *Id.* at 5. If Mendoza’s character for truthfulness is attacked, Lopez will
6 also testify that Mendoza is truthful. *Id.* at 6.

7 Mendoza will elicit from Bermudez that C.B. is not credible and exaggerates a lot.
8 *Id.* He also seeks to elicit Bermudez’s testimony about two specific events where C.B.
9 drank alcohol at parties and acted “in a sexually aggressive manner” to different coworkers.
10 *Id.* at 6. Bermudez would also testify about her conversations with C.B. after the
11 allegations against Mendoza became public and her belief that C.B. fabricated the event.
12 *Id.* at 6-7.

13 Rule 608(a) provides:
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15 A witness’s credibility may be attacked or supported by testimony about the
16 witness’s reputation for having a character for truthfulness or untruthfulness,
17 or by testimony in the form of an opinion about that character. But evidence
18 of truthful character is admissible only after the witness’s character for
19 truthfulness has been attacked.

20 Fed. R. Evid. 608(a).

21 Lopez may not testify that C.B. is dangerous. Mendoza makes no showing that a
22 reputation for dangerousness bears on C.B.’s general character for truthfulness under
23 Rule 608(a). And Bermudez may not testify on direct examination about her opinion that
24 C.B. fabricated the allegations at issue. “Rule 608(a) of the Federal Rules of Evidence
25 does not permit a witness to testify that another witness was truthful or not on a specific
26 occasion.” *United States v. Pereira*, 848 F.3d 17, 22 (1st Cir. 2017); *see also United States*
27 *v. Charley*, 189 F.3d 1251, 1267 n.21 (10th Cir. 1999). Moreover, pursuant to Rule 412
28 and for the reasons explained below, Bermudez may not testify about C.B.’s allegedly
sexually aggressive behavior at the two parties.

1 If C.B. testifies about the alleged attack at trial, evidence of her character for
2 truthfulness is relevant under Rule 401. Under Rule 608(a), Lopez may testify that C.B.
3 has a general reputation for untruthfulness and Bermudez may testify that C.B. has a
4 reputation for not being credible and for exaggerating. If the government attacks
5 Mendoza's character for truthfulness, Lopez may also testify that Mendoza has a reputation
6 for being truthful.

7 The government argues that Lopez and Bermudez lack foundation to offer
8 reputational testimony about C.B. and seeks an evidentiary hearing under Rule 104(c)(3).
9 Docs. 61 at 5; 78 at 3. Because this is a bench trial, however, foundational issues can be
10 addressed during trial – Rule 104(c)(3) applies to jury trials. In ruling on any foundation
11 objections, the Court will remember that lay opinion testimony is governed by Rule 701.
12 That rule provides that the opinion testimony must be “rationally based on the witness’s
13 perception.” Fed. R. Evid. 701(a). “Rule 701 requires a lay opinion [on character for
14 truthfulness] to be based on some personal knowledge, but does not impose formal
15 prerequisites such as long acquaintance or recent information about the witness.”
16 4 Weinstein’s Federal Evidence § 608.13 (2019).

17 **B. To Preclude Evidence Under Rule 412.**

18 With three exceptions, Rule 412 prohibits “evidence offered to prove that a victim
19 engaged in other sexual behavior” or “evidence offered to prove a victim’s sexual
20 predisposition.” Fed. R. Evid. 412(a), (b). “The purpose of the rule is to ‘safeguard the
21 alleged victim against the invasion of privacy, potential embarrassment and sexual
22 stereotyping that is associated with public disclosure of intimate sexual details and the
23 infusion of sexual innuendo into the factfinding process.’” *United States v. Perez*, 662 F.
24 App’x 495, 496 (9th Cir. 2016) (quoting Fed. R. Evid. 412 advisory committee’s notes
25 (1994 amendments)). The rule has been read broadly, and includes even an alleged
26 victim’s thoughts and dreams. *See B.K.B. v. Maui Police Dep’t.*, 276 F.3d 1091, 1104 (9th
27 Cir. 2002); *United States v. Torres*, 937 F.2d 1469, 1472 (9th Cir. 1991).

28 Pursuant to Rule 412, the government moves to preclude all evidence of C.B.’s

1 sexual behavior or predisposition, including evidence that C.B. has sometimes made jokes
2 involving sexual innuendo, discussed her sexual history with others, stated that she “had a
3 crush” on someone, described her experience of dancing and kissing, and made advances
4 to someone at a party. Doc. 73. Mendoza’s response does not address this evidence, and
5 seeks only to admit the same testimony discussed above regarding the government’s first
6 motion. *See* Doc. 75 at 6-8. He does state that “Lopez will not be testifying as to [C.B.’s]
7 prior sexually provocative statements behavior.” *Id.* at 7. But Mendoza again seeks to
8 offer testimony from Bermudez about two incidents at different parties where C.B. drank
9 and was “sexually aggressive.” *Id.* He states that he offers this testimony “as
10 impeachment” to show that C.B. “has a history of consuming substantial amounts of
11 alcohol and consciously and purposefully engaging in sexual behavior,” and that she
12 “consciously and purposefully consented to all sexual acts with Mendoza.” *Id.* at 8.

13 The Court will grant the government’s motion and exclude all of this evidence.
14 Mendoza has filed no proper motion seeking to admit evidence under Rule 412(b), and he
15 does not argue – nor does the Court find – that any of subsection (b)’s exceptions apply.
16 *See* Fed. R. Evid. 412(b)-(c). Mendoza refers to the Sixth Amendment and states that a
17 “witness’s credibility is always relevant and admissible,” but cites no authority and fails to
18 develop this argument as applied to the proffered evidence. Doc. 75 at 6. Mendoza makes
19 no separate argument regarding evidence of C.B.’s drinking behaviors. In any event, it
20 does not appear that the government disputes C.B.’s intoxication on May 3.

21 Under Rule 412, the Court will exclude Mendoza’s proposed evidence of C.B.’s
22 sexual behavior or predisposition, including evidence that she sometimes made jokes
23 involving sexual innuendo, discussed her sexual history with others, stated that she “had a
24 crush” on someone, or described her experience of dancing and kissing, and instances
25 where she allegedly became sexually aggressive.

26 **IV. Mendoza’s Motion to Preclude the Government’s Expert.**

27 Mendoza moves to preclude all testimony by the government’s expert, Kelly N.
28 Willis, who will testify about coping mechanisms exhibited by victims of sexual assault,

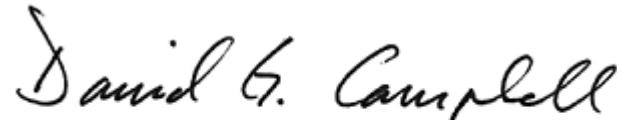
1 including why they may delay in disclosing an assault. Docs. 62; 71 at 2. Mendoza's
2 motion comprises a single page and cites no authority except *Daubert v. Merrell Dow*
3 *Pharm. Inc.*, 509 U.S. 579 (1993), and Rules 401 and 403. *See id.* at 2. Mendoza does
4 not explain why Willis's testimony is inadmissible under *Daubert*. He states only that the
5 testimony is irrelevant, confusing, and will waste time, has no value in a bench trial, and
6 amounts to vouching for the government's theory of the case. *Id.* The government's
7 response addresses the relevancy and reliability of Willis' testimony thoroughly, and cites
8 extensive caselaw showing that courts routinely admit similar evidence. *See id.* at 3-6.
9 Mendoza filed no reply. The Court will deny the motion.

10 **IT IS ORDERED:** the government's motions (Docs. 61 and 73) are **granted** as
11 explained above. Defendant's motion (Doc. 62) is **denied**.

12 Excludable delay pursuant to U.S.C. § 18:3161(h)(1)(D) is found to run from
13 6/19/2019 .

14 Dated this 17th day of July, 2019.

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David G. Campbell
Senior United States District Judge